IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ARIZONA COURT OF APPEALS
DIVISION ONE

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JENNINGS, STROUSS & SALMON

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ARGUMENT

I. THE STATE TAXES ARE PREEMPTED BY COMPREHENSIVE FEDERAL REGULATION OF TRIBAL TIMBER.

Respondents' Brief in Opposition discusses at length the law of federal preemption as it applies to federal statutory schemes other than federal regulation of tribal timber, but it is virtually devoid of discussion of how the application of these state taxes to the White Mountain Apache Tribe's timber operation will in fact affect this federal regulatory scheme. The Respondents do seem to concede that that is the crucial inquiry, for in one place in their Brief they contend:

> "Clearly while there is a federal objective of fostering and promoting Indian forestry programs, such an objective is neither frustrated nor impeded by permitting the continued application of the state taxes in question to the operations of the non-Indian taxpayer herein, Pinetop Logging Co." (Brief in Opposition, pp. 10-11)

The Petition for Certiorari outlines exactly how application of the state taxes will frustrate or impede the federal objective of fostering

and promoting Indian forestry programs. (Petition, pp. 22-25)

The financial consequences of state taxation are highly relevant considerations in any question of federal preemption of state taxes. The federal policies embodied in the timber regulations are the development of reservation-based economies for the employment of Indian peoples, the continuous production of a perpetual forest business for the benefit of the Indians, providing to the Indians "the benefit of whatever profit" the forest is capable of yielding, the preservation of "the recreational or aesthetic value of the forest to the Indians," and "the preservation or development of grazing, wildlife and other values of the forest to the extent that such action is in the best interest of the indians." 25 C.F.R. § 141.3 (1978)

The draining of revenues out of tribally operated forestry programs for the construction of off-reservation state highways detracts from all of these federal objectives. Rather than rebut Petitioner's contentions of actual and specific disruption of the federal objectives by these state taxes, Respondents simply refuse to discuss those actual adverse effects.

II. THE ARIZONA ENABLING ACT.

The Arizona Enabling Act deprives the State of Arizona of regulatory jurisdiction over Indian tribal trust land itself. 36 Stat. 557, 560 (1910), cf. Draper v. United States, 164 U.S. 240, 247 (1896). Taxation of tribal agents for the privilege of using tribal lands in the tribe's own business is plainly an assertion of regulatory authority over the tribal lands.

In any event, the question whether imposition of these taxes should be characterized as state regulation of tribal lands is itself a question of federal law. First Agricultural

National Bank v. State Tax Commission, 392 U.S. 339, 346-47 (1968).

Respondents' Brief in Opposition declines to discuss whether the application of these state taxes in this case constitutes forbidden state regulation of tribal lands. Rather, the respondents simply invoke the lower court's self-serving state-law ruling that the formal incidence of the tax is upon the non-Indian agent of the tribe. Respondents argue the taxes do not run afoul of the Arizona Enabling Act provided they are not denominated as property taxes. (Brief in Opposition p. 29) Thus, the Respondents suggest that state regulation of tribal lands by any other name is not state regulation of tribal lands. Petitioners submit to the contrary that the statutes of the Congress are not so impotent and that the states are not permitted to levy taxes forbidden by federal law on the simple ruse of saying they are some other kind of taxes.

III. 25 C.F.R. § 1.4

By its plain language, 25 C.F.R. § 1.4 should apply to prohibit these state taxes on the use of Indian roads and on the hauling of Indian timber on the reservation. The Respondents' Brief in Opposition offers no argument whatsoever that the literal meaning of the regulation would not prohibit the taxes in question. Instead, the Respondents argue that the regulation is invalid as applied to prohibit these taxes.

Questions over the validity of 25 C.F.R. § 1.4, which has been increasingly used in the litigation of jurisdictional disputes between tribes and states, have troubled many of the lower courts. The standard for determining the validity of the regulation in any particular situation is properly stated by the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (1975), a case relied upon by the Respondents. The Ninth Circuit

there upheld § 1.4 as barring state regulation of mobile home use on reservation land acquired under the Indian Reorganization Act of 1934, 25 U.S.C. § 465. The Ninth Circuit stated the standard of validity as follows:

> "Rule-making authority for the 'management of all Indian affairs and of all matters arising out of Indian relations' is conferred by 25 U.S.C. § 2; 25 U.S.C. § 9 delegates rule-making authority to 'effect the various provisions of any act relating to Indian affairs ...' It has been held that neither provision grants general regulatory powers to the Secretary of the Interior; to be valid a regulation must be reasonably related to some other specific statutory provision. See Organized Village of Kake v. Egan, supra, 369 U.S. at 63, 82 S.Ct. 562; United States Department of the Interior, Federal Indian Law 56-57 (1966); Cohen, Handbook of Federal Indian Law 102-103 (1945). We think 25 U.S.C. § 465, which authorizes the Secretary to purchase land for the 'purpose of providing land for Indians' and to take the title to such lands in trust, when read against the history of Federal policy governing use and control of Indian trust property, is sufficient to sustain the regulation as it applies to the Rancheria lands, obtained pursuant to § 465." 532 F.2d at 665-666.

The Ninth Circuit also suggested that 25 C.F.R. § 1.4 may not even require specific

statutory basis as applied to prohibit state regulation of use of reservation lands. 532 F.2d at 666 n. 19.

Thus, the validity of 25 C.F.R. § 1.4 in any particular situation depends on the background of federal law and legislation concerning both the specific state in question and the subject matter of the particular jurisdictional dispute between the tribe and the state. For example, § 1.4 would have considerably lesser scope in a "P.L. 280" state like California than in a state like Arizona which as assumed no jurisdiction over Indian reservations. Cf. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

The touchstone of the validity of § 1.4 in this case is, as the Ninth Circuit has said, whether the regulation is "reasonably related to some other specific statutory provision." The Arizona Enabling Act is a specific federal statutory provision speaking to the authority

of the state and of the United States over Indian reservation lands in the state of Arizona. That statute says that "absolute jurisdiction and control" shall remain in the federal government. Therefore, 25 C.F.R. § 1.4 is valid insofar as it implements the Arizona Enabling Act by making clear that the State of Arizona may not tax the use or development of reservation lands or of reservation timber, even by a non-Indian.

Since the Respondents offer no real defense of the lower court's disregard of the plain language of 25 C.F.R. § 1.4 and since their alternative attack on the validity of the regulation is clearly unmeritorious when the regulation is read together with the Arizona Enabling Act, the lower court's error in refusing to apply § 1.4 is obvious. The adverse consequences of this precedent for Indian people in many states make it appropriate for this court to correct that error.

IV. THE STATE TAXES IMPERMISSIBLY INFRINGE ON TRIBAL GOVERNMENT.

The Respondents' position is that no state taxation of non-Indians can ever run afoul of the infringement doctrine, no matter what the specific effect of such taxation is upon tribal government. The Respondents propose a "per se" rule that the doctrine against infringement of tribal government can never be invoked to strike down application of a state tax where the formal incidence of the tax is upon the person or property of a non-Indian. (Brief in Opposition, pp. 39-46)

Petitioners do not claim any general immunity of non-Indians from state taxation of their affairs on Indian reservations, but it is possible that in some situations state taxation of non-Indians could interfere with tribal government. The Arizona Court of Appeals refused to consider the particularized effects of the challenged taxes on the White Mountain Apache Tribe's governmental freedom, thus

emasculating the infringement doctrine wherever state intrusion into tribal affairs is done on the pretext of regulating non-Indians.

The mode of analysis actually contemplated by the infringement doctrine is more subtle than that. A major decision published since the Petition for Certiorari was filed well illustrates the proper application of the infringement doctrine to state regulation and taxation of non-Indians. In Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978), the Fourth Circuit held that the doctrine against infringement of tribal government prevented the state from applying its fishing regulations to and exacting its fishing license fees from non-Indians who fish on reservation streams stocked entirely by the Tribe and by the federal government. The state had no part at all in this purely commercial fishery operation by the Tribe. The Court held:

> "If we were required to reach the second part of the Williams test, we would readily find that the state's regulation frustrates and impedes one major goal of tribal self-government, financial self-sufficiency. This case is quite different from Moe v. Salish & Kootenai Tribes, supra, where the Court was careful to stress the imposition of state sales tax borne by non-Indians on the reservation did not frustrate tribal self-government. Imposition of North Carolina's license requirement would impair the Band's attempts to manage its own affairs by curbing its revenues and reducing the receipts of many of its members doing business with tourists.
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>
> . . . [W]e can conceive of no possible interest of North Carolina in this purely commercial undertaking, while the stocking of the streams and the licensing of visiting fishermen by the Band is an established program of the Bands from which the Tribe itself and its members derives substantial economic benefits, benefits which are greatly diminished by North Carolina's enforcement of its own fishing licensing laws." 588 F.2d at 78-79.

Significantly, the Fourth Circuit does not uphold a general immunity of non-Indians from state fishing regulations on Indian reservations but rather upholds an immunity in the particular circumstances of the case before it under which

the state can show "no possible interest" in intruding into and taxing non-Indian participation in the Tribe's "purely commercial undertaking."

That same detailed examination of the specifics of this case should lead to the same conclusion here. The State of Arizona has no conceivable interest in taxing the use by the Tribe through its agents of tribally-owned, built, and maintained roads, especially where the state highway taxes in question are not in any way used to support the tribal roads.

The fact that the analysis and result of the Arizona Court of Appeals in this case is starkly in conflict with the recent analysis and holding of the Fourth Circuit in Eastern Band of Cherokee Indians again highlights the fundamental error in the Arizona court's interpretation of the infringement doctrine. That error has ramifications for many Indian peoples and should be set right.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 1979

CERTIFICATE OF SERVICE

I am one of the attorneys for the Petitioners and a member of the Bar of this Court. I hereby certify that I caused three (3) copies of the foregoing Petitioners' Reply to Brief in Opposition to Petition for Writ of Certiorari to be mailed, first Class postage prepaid, on March 1, 1979, to:

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All parties required to be served have been served.

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